



FEDERAL TRADE COMMISSION

[File No. 191 0153]

Board of Dental Examiners of Alabama; Analysis of Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement; Request for Comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write: “Alabama Board of Dental Examiners; File No. 191 0153” on your comment, and file your comment online at

www.regulations.gov by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address:

Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Philip Kehl (202-326-2559), Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington,

DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Website at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Alabama Board of Dental Examiners; File No. 191 0153” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *www.regulations.gov* website.

Due to protective actions in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *www.regulations.gov* website.

If you prefer to file your comment on paper, write “Alabama Board of Dental Examiners; File No. 191 0153” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D),

Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *www.regulations.gov*, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *www.regulations.gov* – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit

a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing this matter. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with the Board of Dental Examiners of Alabama (the "Board"). The Board is an Alabama state agency comprised of six licensed dentists and one licensed dental hygienist. The Board is charged with administering dental licensing in Alabama and carrying out the provisions of the Alabama Dental Practice Act.

The consent agreement contains a proposed order addressing allegations in the proposed complaint that the Board has unreasonably excluded competition from providers of teledentistry-based teeth alignment products and services without adequate supervision from neutral state officials, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the consent agreement and the comments received and will decide whether it should

withdraw from the consent agreement and take appropriate action or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way. The consent agreement is for settlement purposes only and does not constitute an admission by the Board that the law has been violated as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts, are true.

II. Challenged Conduct

This matter involves allegations that the Board unreasonably impeded competition from new providers of clear aligner therapy in Alabama. The Board is a state regulatory agency controlled by practicing, Alabama-licensed dentists.

Braces and clear aligners (removable, fabricated molds) are treatment options for misalignment or incorrect relation between teeth (called malocclusion). Many patients are prescribed braces or clear aligners following a visit to a dentist's or orthodontist's office.

In recent years, several new firms have launched platforms that facilitate treatment for malocclusion using teledentistry. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting. To initiate treatment with a clear aligner platform, a prospective patient may visit a storefront location, where a non-dentist professional will perform a digital scan of the patient's teeth and gums to create a 3D image of the patient's mouth. The results of this intraoral scan are provided to a dentist working remotely, who determines whether the patient is a candidate for clear aligner therapy. For reasons of price and convenience, many consumers prefer clear aligner therapy supplied through a teledentistry model.

After the entry and expansion of clear aligner platforms in Alabama, in September

2017, the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board’s interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist personnel from taking intraoral scans without on-site supervision by a dentist. Following a Board vote, in September 2018, the Board sent SmileDirectClub, LLC (“SmileDirectClub”), a clear aligner platform, a letter directing SmileDirectClub to cease and desist from taking intraoral scans without on-site dentist supervision.

Because of the Board’s conduct, consumers in Alabama have been deprived of full competition for the treatment of malocclusion. For example, because of the Board’s conduct, SmileDirectClub has halted a planned expansion of storefronts in Alabama.

III. Legal Analysis

Section 5 of the FTC Act prohibits unfair methods of competition, including concerted action prohibited by Section 1 of the Sherman Act.¹ To establish a violation of Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.²

State regulatory boards comprised of active market participants can violate Section 1 by promulgating and enforcing rules that harm competition in the industry in which board members participate.³ The Board’s rule amendment and cease-and-desist letter harmed competition by impeding consumer access to a low-cost and convenient option for the treatment of malocclusion.

The state action defense is not applicable here. Active market participants control the Board. Therefore, for the Board’s conduct to constitute state action, neutral state officials must actively supervise the Board’s conduct. The State’s supervision

¹ 15 U.S.C. § 45; see, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948).

² 15 U.S.C. § 1; see, e.g., *National Collegiate Athletic Ass’n v. Alston*, 141 S.Ct. 2141, 2151 (2021); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–43 (1982).

³ See *N.C. Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 510–12 (2015).

mechanisms must provide “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”⁴

Although the Board’s rule amendment was reviewed by Alabama’s Legislative Services Agency (“LSA”), that review did not satisfy the “constant requirements” of active supervision articulated by the Supreme Court.⁵ The LSA did not review the substance of the rule amendment, specifically whether the rule comports with clearly articulated state policy to displace competition.⁶ Additionally, the LSA lacked the authority to veto or modify the Board’s decisions.⁷ Furthermore, the Board’s cease-and-desist letter to SmileDirectClub did not receive any review by the LSA or any other state officials.

IV. Proposed Order

The proposed order seeks to remedy the Board’s anticompetitive conduct by requiring the Board to cease and desist from requiring on-site supervision by dentists when non-dentists perform intraoral scans on prospective patients.

Section II of the proposed order addresses the core of the Board’s anticompetitive conduct. Paragraph II.A. orders the Board to cease and desist from requiring non-dentists affiliated with clear aligner platforms to maintain on-site dentist supervision when performing intraoral scanning. Paragraph II.B. prohibits the Board from impeding clear aligner platforms, or dental professionals affiliated with clear aligner platforms, from

⁴ Patrick v. Burget, 486 U.S. 94, 101 (1988).

⁵ See *N.C. Bd. of Dental Exam’rs*, 574 U.S. at 515 (“The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant.”) (internal citations and quotations omitted).

⁶ Instead, the LSA determined, without explanation, that the rule amendment “does not affect competition at all.” See Exhibit A to Brief in Support of Motion to Dismiss (Memo to File from Paula M. Greene, Feb. 12, 2018) at 13, 15, *Leeds v. Board of Dental Examiners of Alabama*, No. 2:18-cv-01679, (N.D. Ala. Nov. 21, 2018), ECF No. 33. Because the LSA made this determination, it did not review whether the rule was made pursuant to a clearly articulated state policy. See Ala. Code § 41-22-22.1.

⁷ Alabama statutes provide a procedure by which certain Board action may be reviewed by the Alabama Legislature’s Joint Committee on Administrative Regulation Review. See Ala. Code § 41-22-22.1. The Joint Committee did not review the actions at issue in this case.

providing clear aligner therapy through remote treatment.

Section III requires the Board to provide notice of the proposed order to Board members and employees, and to certain dentists and clear aligner platforms. Section IV requires the Board to notify the Commission of any changes to its rules related to intraoral scanning or clear aligner platforms. Section IX provides that the Order will terminate 10 years from the date it is issued.

By direction of the Commission.

April J. Tabor,

Secretary.

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